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No. 00-1259

In the Supreme Court of the United States

SORAYA NOLAND, PETITIONER

v.

WILLIAM HENDERSON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly granted summary judgment against petitioner's Title VII retaliation claim on the ground that petitioner presented no evidence regarding the existence of a retaliatory motive.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 238 F.3d 413 (Table). The opinion of the district court (Pet. App. 3-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2000. The petition for a writ of certiorari was filed on February 2, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed as a Human Factors Specialist, EAS level 24, by the United States Postal

Service (USPS) in 1992 when the USPS undertook a significant restructuring. As a part of that reorganization, certain positions were officially eliminated and those job functions were transferred to other offices within USPS. Affected employees applied for new positions by submitting certain forms to their supervisors. Those employees did not apply for specific jobs, but rather were assigned on the basis of such factors as prior relevant experience, as detailed in the forms provided to supervisors. As a result of this process, petitioner was assigned to a new position at the same pay level and with similar responsibilities as in her previous job. Pet. App. 5-6.

During the restructuring, three EAS level 25 positions were created. Pet. App. 6. These "systems process engineer" positions required substantial practical experience with postal operations in the field. C.A. App. 88. The vice president of engineering instructed the engineering department manager, Larry Elyea, to "recruit heavily from field resources" in filling those positions, *id.* at 64, and Elyea accordingly "look[ed] for field expertise and knowledge in the hands-on distribution in the field," *id.* at 69. One of the positions was offered to a female director of operations in the field but she did not take it. *Id* at 70. Ultimately, all three systems process engineer positions were filled by male employees with a minimum of four years' field operational experience. *Id.* at 94- 112. Petitioner did not have similar "hands-on" engineering experience in the field and, accordingly, was not considered for one of the EAS 25 positions. *Id.* at 224-225.

In 1996, there was another, more limited reorganization. Effective March 30, 1996, petitioner's job functions were reassigned to the Engineering Department under Elyea. Pet. App. 6. Petitioner had stated to

upper management that she did not desire that transfer because Elyea had, in her perception, created a sexually hostile atmosphere by divulging details to coworkers of an affair the two had had some years prior. *Ibid.* At petitioner's request, she was temporarily assigned to the Delivery and Customer Services Department until August 30, 1996, when the USPS made its final determination that petitioner's allegations of a sexually hostile atmosphere were not substantiated. *Ibid.* Following that determination, petitioner went to work in the Engineering Department. While assigned to that department, petitioner was supervised by David Aubin, whom Elyea named as the group leader for Human Factors Engineering. Aubin was one of the three employees offered the EAS-25 positions in 1992. *Ibid.* Petitioner contends that she did not learn of the existence of the systems process engineer positions prior to her transfer to Aubin's supervision.

On February 18, 1997, petitioner and a coworker, Rose Hayes, filed formal Equal Employment Opportunity (EEO) complaints under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 7. In those complaints, petitioner and Hayes alleged sex discrimination because they were not notified of and considered for the three systems process engineer positions in 1992. Petitioner also complained generally of a continuing pattern and practice of sexual discrimination and harassment and of other allegedly discriminatory conduct, including exclusion from certain management training seminars, refusal to allow her to act as temporary manager in her supervisor's absence, and denial of two requests for special details. C.A. App. 171-174.

In subsequent EEO complaints, petitioner asserted that her supervisors retaliated against her for filing the

initial complaint. The allegedly retaliatory acts included additional refusals of management training, temporary management duties, and detail requests; denial of adequate accommodation for a temporary eye affliction; transfer of petitioner's workstation such that it was within view of the outside of Elyea's office; and completion of her personal achievement plan in a manner of which she did not approve. Pet. 3; Pet. App. 7-8.

2. Petitioner and Hayes then filed complaints in federal district court, alleging four claims of sex discrimination and retaliation under Title VII and one claim of disability discrimination under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791 (1994 & Supp. IV 1998). Pet. App. 4. The United States Attorney's Office moved for summary judgment. One of the arguments in the motion was that the actions of which petitioner complained did not rise to the level of ultimate employment decisions and therefore were not cognizable as retaliation under Title VII. The district court granted the motion for summary judgment with respect to four of the claims and accepted the plaintiffs' withdrawal of the fifth. *Id.* at 9-13.

With respect to petitioner's retaliation claim—the only claim presented here—the court granted summary judgment for two reasons. First, the court held that "there is no evidence of any adverse employment action" because the "type of actions" that petitioner challenged "do not amount to retaliation or retaliatory harassment that can give rise to a cause of action under Title VII." Pet. App. 11-12. In addition, the court concluded that "there is no evidence to show that defendant's conduct in these matters was anything less than satisfactory, much less done with intent to * * * retaliate for the filing of an EEO complaint." *Id.* at 12.

3. Petitioner appealed the district court's decision. Following review of this Court's decisions in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998) and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), the government in the court of appeals did not rely on an "ultimate employment decision" standard, but instead argued that petitioner's allegations did not constitute tangible employment actions. The Fourth Circuit affirmed summarily on the reasoning of the district court in an unpublished, per curiam opinion. Pet. App. 1-2.

ARGUMENT

The decisions below are correct and did not endorse the "ultimate employment decision" standard in determining what constitutes an adverse employment action for retaliation claims under Title VII. Moreover, a recent Fourth Circuit decision makes clear that the court does not follow the "ultimate employment decision" standard. In any event, the courts below also granted summary judgment because there was no evidence that the adverse actions that petitioner alleges were done "with intent to * * * retaliate for the filing of an EEO complaint." Pet. App. 12. Petitioner does not challenge this independent ground in her petition, so review of the "adverse employment action" determination below would not affect the ultimate outcome in this case. Further review by this Court is not warranted.

1. Section 2000e-3 provides that it "shall be an unlawful employment practice for an employer to discriminate against any of his employees * * * because [the employee] has made a charge * * * under this

subchapter."[1] In order to make out a prima facie case of retaliation under Section 2000e-3, a plaintiff must show (1) that she engaged in statutorily protected activity, (2) that she suffered an adverse employment action, and (3) that there is a causal link between the protected expression and the adverse action. See *Hopkins* v. *Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir.), cert. denied, 519 U.S. 818 (1996).

Petitioner argues that the Court should grant certiorari to resolve a split among the courts of appeals regarding the proper standard to be applied in determining what is an actionable "adverse employment action" in Title VII retaliation claims. Contending that the Fourth Circuit follows the more "rigorous approach" that a plaintiff must have suffered from an "ultimate employment decision" such as hiring, discharging, promoting, and compensating (Pet. 5), petitioner argues that her case would have been decided differently in a circuit that recognizes that other types of employer conduct may give rise to retaliation claims. Pet. 9-10.

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[1] The courts below treated petitioner's claim as if it had been brought directly under 42 U.S.C. 2000e-3. Pet. App. 4, 12. However, it is actually 42 U.S.C. 2000e-16 (1994 & Supp. IV 1998) that governs the Title VII claims brought against USPS in this case. That provision states that "[a]ll personnel actions affecting employees * * * in the United States Postal Service * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." Whatever differences may exist between these two statutes, see, *e.g.*, note 3, *infra*, were not explored in the courts below, which treated this as a claim under Section 2000e-3. We likewise address the Section 2000e-3 case law, but note that the potential (but unexplored) differences in the application of Section 2000e-16 make this case a poor vehicle to consider issues raised under either statutory provision.

The courts of appeals have articulated different standards for what types of employer conduct are actionable under 42 U.S.C. 2000e-3. In *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 707, cert. denied, 522 U.S. 932 (1997), the Fifth Circuit held that Title VII retaliation claims are intended to address only "ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Mattern* defined ultimate employment decisions as acts "such as hiring, granting leave, discharging, promoting, and compensating." *Ibid.* The Fifth Circuit continues to adhere to this view.[2] See *Thomas* v. *Texas Dep't of Criminal*

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[2] Petitioner also contends that the Eighth Circuit allows only Title VII retaliation claims that challenge ultimate employment decisions. See Pet. 6 n.7. But one of the cases cited for that proposition—*Manning* v. *Metropolitan Life Insurance Co.*, 127 F.3d 686 (8th Cir. 1997)—stated that a retaliation claim would lie for a "tangible change in duties or working conditions that constituted a material employment disadvantage," *id.* at 692, and recognized an earlier case holding that "negative references to potential employers constituted sufficient adverse action to state a retaliation claim." *Ibid.* (citing *Smith* v. *St. Louis Univ.*, 109 F.3d 1261, 1266 (8th Cir. 1997)). Another Eighth Circuit opinion held that "reduction of duties, disciplinary action and negative personnel reports, as well as required remedial training, constituted adverse employment action" in a retaliation claim. *Kim* v. *Nash Finch Co.*, 123 F.3d 1046, 1060 (1997). Thus, the Eighth Circuit allows retaliation claims that challenge conduct in addition to hiring, granting leave, discharging, promoting, and compensating decisions. Moreover, the Eighth Circuit cases that petitioner cites all predate this Court's decisions in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998). As petitioner discusses, some courts have reexamined what constitutes an adverse employment action in retaliation claims in light of *Ellerth* and *Faragher*. See Pet. 11-13

Justice, 220 F.3d 389, 394 n.2 (5th Cir. 2000) (quoting *Mattern*, 104 F.3d at 707). Other courts of appeals have held that "Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions." *Wideman* v. *Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998); see also *Wyatt* v. *City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994); *Wanamaker* v. *Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997); *Knox* v. *Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996); *Fielder* v. *UAL Corp.*, 218 F.3d 973, 985 (9th Cir. 2000), petition for cert. pending, No. 00-1397; *Gunnell* v. *Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998). And, as petitioner points out (Pet. 8-9), the Equal Employment Opportunity Commission (EEOC) takes the position that 42 U.S.C. 2000e-3 prohibits any retaliatory conduct that is "reasonably likely to deter protected activity." Pet. 9.

Contrary to petitioner's assertion, however, "'ultimate employment decision' is not the standard in [the Fourth] [C]ircuit." *Von Gunten* v. *Maryland*, No. 00-1058, 2001 WL 273104, at *4 (Mar. 20, 2001). The district court in this case did not adopt that standard or cite any case applying that standard; rather, the court made the general conclusion that "there is no evidence of any adverse employment action" and "the type of actions alleged * * * do not amount to retaliation or retaliatory harassment that can give rise to a cause of action under Title VII." Pet. App. 11-12. Indeed, use of the term "retaliatory harassment" is a recognition that harassment may be the basis for a retaliation claim. The court of appeals then issued an unpublished, per

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(citing *Morris* v. *Oldham County Fiscal Court*, 201 F.3d 784, 791 (6th Cir. 2000)).

curiam opinion that affirmed "on the reasoning of the district court." *Id.* at 2.

The Fourth Circuit's recent opinion in *Von Gunten* v. *Maryland*, *supra*, makes clear that "conduct short of 'ultimate employment decisions' can constitute adverse employment action for purposes of § 2000e-3." 2001 WL 273104, at * 5. Although *Von Guten* recognized that the circuit had "never before expressly so held," *ibid.*, the court explained that its prior decisions had recognized that retaliation claims may be based on actions other than ultimate employment decisions. For example, in *Ross* v. *Communications Satellite Corp.*, 759 F.2d 355, 366 (4th Cir. 1985), the court "recognized that * * * acts of retaliatory harassment, if proved, could constitute adverse employment action" when it remanded retaliatory harassment claims to the district court. *Von Guten*, 2001 WL 273104, at *5 (citing *Ross*, 759 F.2d at 363). Similarly, in *Munday* v. *Waste Management of North America, Inc.*, 126 F.3d 239 (4th Cir. 1997), cert. denied, 522 U.S. 1116 (1998), the court of appeals recognized that retaliatory conduct affecting "the terms, conditions, or benefits" of employment could be actionable under Title VII. *Id.* at 243, cited in *Von Guten*, 2001 WL 273104, at *5.

The *Von Guten* court also explained that *Page* v. *Bolger*, 645 F.2d 227, 233 (4th Cir.) (en banc), cert. denied, 454 U.S. 892 (1981), which petitioner asserts adopted the "ultimate employment decision" standard that the Fifth Circuit follows (Pet. 5 n.6), did not restrict adverse employment actions to the "ultimate employment decisions" of hiring, discharging, promoting, and compensating. 2001 WL 273104, at *6 (quoting *Page*, 645 F.2d at 233). Rather, *Page* explained that retaliation claims could be based on other decisions, including an employee's "entry into training programs."

645 F.2d at 233. The other case that petitioner asserts followed the "ultimate employment decision" standard (Pet. 5 n.6)—*Boone* v. *Goldin*, 178 F.3d 253, 255-256 (4th Cir. 1999)—actually recognizes that non-economic harms, such as level of responsibility, can form the basis for retaliation claims.[3]

Thus, the Fourth Circuit does not follow the "restrictive" (Pet. 5) ultimate employment decision standard that petitioner asks this court to review.

2. In any event, the courts below granted summary judgment on petitioner's retaliation claim for the independent and adequate reason that she failed to create a genuine issue as to whether the alleged adverse employment actions were taken in retaliation for her protected activity. Pet. App. 12. This decision is correct and is not challenged in the petition.

Many of the actions of which petitioner complains date back to before she first contacted an EEO counselor in late 1996. For example, a supervisor notified petitioner about the following decisions before she contacted EEO officials: her non-promotion, the

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[3] *Von Gunten* suggests a potential distinction between the Section 2000e-3 claims at issue in that case and the Section 2000e-16 federal-sector employee claims at issue in *Page* and *Boone*: Because Section 2000e-16 applies only to "personnel actions," the standards for retaliation claims brought under that Section may be different from those brought under the retaliation provision of Section 2000e-3. 2001 WL 273104, at *6 n.3. But see *Brown* v. *Brody*, 199 F.3d 446, 452-453 (D.C. Cir. 1999) (holding that Section 2000e-16 incorporates standards of Section 2000e-3); *Porter* v. *Adams*, 639 F.2d 273, 277-278 (5th Cir. 1981) (same); *Ayon* v. *Sampson*, 547 F.2d 446, 450 (9th Cir. 1976) (same). As discussed *supra* note 1, the courts below evaluated petitioner's claims under Section 2000e-3. Therefore, this case is not the proper vehicle to review *Von Gunten*'s suggestion that different standards may exist in the two provisions.

refusal of special details, and the decision not to allow her to attend certain management seminars. C.A. App. 168, 171-174. None of these actions can therefore be considered retaliation. See *Gibson* v. *Old Town Trolley Tours of Wash., D.C., Inc.*, 160 F.3d 177, 181 (4th Cir. 1998) (defendant's action could not possibly have been motivated by an EEOC complaint that had not yet been filed); *Fennell* v. *First Step Designs, Ltd.*, 83 F.3d 526, 536 (1st Cir. 1996) (decision to terminate plaintiff made prior to her EEO activity could not constitute retaliation even though decision was arguably not final at the time of plaintiff's complaint).

In addition, the USPS identified non-retaliatory reasons for the relevant supervisory decisions. For example, Elyea explained that petitioner was not allowed to act as a temporary manager in his stead because she was not a group leader and did not have the necessary qualifications and familiarity with the department. See C.A. App. 173. Indeed, petitioner admitted in an e-mail that she was unfamiliar with the functions she would have to oversee. *Id.* at 130. In another example, USPS adduced evidence to show that petitioner was denied attendance at management seminars because she was needed in her current position, the department's budget could not accommodate the cost of the seminars, and because she had not defined her career goals in a way that justified the training. *Id.* at 77, 90-91, 120, 128-129. In response, petitioner failed to create a genuine issue of material fact that these non-discriminatory reasons were pretexts for retaliation. Without any evidence that the USPS's explanations were pretextual, the district court properly granted summary judgment. See, *e.g.*, *Karpel* v. *Inova Health Sys. Servs.*, 134 F.3d 1222, 1228-1229 (4th Cir. 1998); *Essex* v. *United Parcel Serv., Inc.*, 111 F.3d 1304, 1308-

1310 (7th Cir. 1997) (citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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